SUPREME COURT, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1049

In the Supreme Court of the United States

OCTOBER TERM, 1987

AIR FLORIDA SYSTEM, INC., AND
INTERFIRST BANK, DALLAS, N.A., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when a contract entered into by a receiver has been approved by the district court overseeing the receivership and the receiver later brings a suit for breach of the contract which happens to be heard by the same district judge, the ordinary rule that the interpretation of an unambiguous contract provision is a question of law subject to de novo review on appeal is inapplicable, and the court of appeals is required to afford special deference to the district judge's interpretation.

2. Whether the court of appeals properly concluded that the meaning of the contract provision at issue in this case could be determined as a matter of law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 822 F.2d 833. The opinion of the district court (Pet. App. B1-B12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1987. A petition for rehearing was denied on September 22, 1987. The petition for a writ of certiorari was filed on December 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In October 1973, United States National Bank (USNB), a national bank located in San Diego, California, was declared insolvent by the Comptroller of the Currency, and respondent Federal Deposit Insurance Corpora-

tion (FDIC) was appointed receiver (see Pet. App. B2). The assets of USNB included a substantial debt owed to USNB by Westgate California Corporation (Westgate). In February 1974, Westgate entered reorganization under the Bankruptcy Code. *Ibid.* The USNB receivership was Westgate's largest single creditor and was ultimately determined to be "entitled to receive a substantial percentage of the common stock and substantially larger percentages of Class A and B preferred stock to be issued by the Reorganized Westgate" (*ibid.*).

Petitioner Air Florida was interested in acquiring the USNB receivership's stake in Westgate in order to obtain control of Westgate's principal operating subsidiary, Air California (Pet. App. A6). Negotiations between Air Florida and the FDIC as receiver began in August 1980 and resulted in a purchase agreement in which Air Florida agreed to purchase the receivership's interest in Westgate. Air Florida agreed to pay the USNB receivership approximately $18 per share for its right to receive common stock in the reorganized Westgate and approximately $17.22 per share for its right to receive preferred stock (*id.* at A7; Pet. 6). The agreement was approved in November 1980 by the court supervising the USNB receivership (Pet. App. B3), and shortly thereafter Air Florida paid the FDIC $15.4 million (*id.* at A6). On May 26, 1981, the court in the Westgate reorganization proceeding ordered that stock in the reorganized Westgate be distributed to Westgate's creditors (*id.* at B5). The reorganized company's stock was issued to Air Florida and the other creditors shortly thereafter (*ibid.*).[1]

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[1] The agreement also provided that the purchase price would be adjusted upon sale of a cannery owned by Westgate (Pet. App. A7). Air Florida subsequently assigned its rights under the cannery provision to petitioner InterFirst Bank.

As part of the purchase agreement, Air Florida "promised to make a general public offer for outstanding Westgate common shares at no less than the price it paid the FDIC. If Air Florida acquired more than 80% of Westgate's common stock, and if it paid more per share to tender-offerees than the FDIC received, the FDIC was entitled to additional compensation to afford it the same price per share paid the tender-offerees" (Pet. App. A6). The tender offer was to be made within 425 days after the consummation of Westgate's reorganization (*id.* at B4).

After Air Florida had acquired the receivership's Westgate stock, "Westgate's bankruptcy trustees arranged, and [its reorganization] court approved, the sale of Air California to a third party for $61.5 million. The sale caused a substantial increase in the trading price of outstanding shares of Westgate common stock." Pet. App. A6. After the sale of Air California, Westgate's common shares "traded between $21 and $26.50 per share" (*id.* at A7). At that point (February 1982), Air Florida decided not to make the tender offer required by the agreement (*ibid.*). On April 1, 1982, Westgate's directors announced that Westgate would be liquidated, with shareholders receiving a liquidating dividend of $28.25 per share; the liquidating dividend was paid on May 3, 1982 (*id.* at A7 & n.1).

2. On April 30, 1982, the FDIC as receiver brought suit against Air Florida in the United States District Court for the Southern District of California, claiming that Air Florida had violated the purchase agreement by not making a tender offer; the FDIC sought rescission and restitution (Pet. App. A7). Air Florida counterclaimed for some $2 million it claimed the FDIC owed it under the cannery provision (*ibid.*; see note 1, *supra*). This suit, although independent of the USNB receivership, was transferred pursuant to local rule to the same United States District

Judge (Neilsen, J.) who oversaw the receivership and who in that capacity had approved the purchase agreement. See Minute Order of May 6, 1982.

The district court rejected the FDIC's claim of breach, finding that Air Florida was required to make a tender offer only at the price it had paid to the FDIC and that such an offer would have been pointless, since at all times after the sale of Air California the price of Westgate common stock had been well above the $18 per share the FDIC received (Pet. App. A10-A11, B5-B8). The district court admitted extrinsic evidence offered to prove the intent of the parties, but it held that "the Court's determination of this matter is the same whether the Court considers the admitted parol evidence or interprets the Agreement as a matter of law without the aid of parol evidence" (*id.* at B7).[2]

3. The court of appeals reversed. Reviewing de novo the interpretation of the tender offer provision of the purchase agreement (Pet. App. A8 & n.2), it held that the agreement used the term "tender offer" to refer to a "bona fide attempt to acquire control of a company. At the very least, it is an offer reasonably calculated to persuade shareholders to sell their stock" (*id.* at A12). The court then ruled, "[a]n offer of only the minimum price [of $18], in the face of a higher market price, in our view would not

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[2] The district court also ruled in Air Florida's favor on its counterclaim. It ordered that the amount of the cannery adjustment be determined by the parties, the parties' accountants, or an independent accountant, pursuant to the arbitration procedures set forth in the agreement; the district court initially left its judgment open pending determination of that amount (Pet. App. B9). On October 7, 1985, the district court issued judgment in favor of petitioner InterFirst Bank (Air Florida's assignee), enforcing the arbitrator's award and granting interest to run from the date of that award to the date of payment by the FDIC (*id.* at B11-B12).

be a bona fide tender offer" (*ibid.*). The court rejected petitioners' arguments that other language in the agreement contradicted the court's interpretation (*id.* at A13-A14) and held that certain extrinsic evidence to which petitioners pointed did "nothing to contradict the plain meaning of the agreement or render it ambiguous" (*id.* at A14). The court of appeals remanded the proceeding to the district court to determine whether Air Florida's failure to make the tender offer constituted a "material" breach entitling the FDIC to rescission; the court of appeals said that if the breach was not material the FDIC would be entitled to unspecified restitution or damages (*id.* at A17-A20).[3]

ARGUMENT

The court of appeals' ruling that it could interpret de novo a contract it found unambiguous, and that it was not required to afford special deference to the interpretation reached by a district judge who happened also to have approved the contract in his supervisory capacity over a receivership, is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

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[3] The court of appeals rejected the FDIC's argument that it was excused from complying with the arbitrator's award on the cannery agreement for reasons other than Air Florida's breach of the tender offer provision (Pet. App. A21-A24), but it remanded the cannery provision issue to the district court, stating that if the FDIC were found entitled to rescind the contract it would be excused from the cannery provision; otherwise, the FDIC would have to comply with the arbitrator's award (*id.* at A20-A21), which would be set off against any award of damages to the FDIC as compensation for Air Florida's breach of the tender offer agreement (*id.* at A26). The court of appeals also upheld the district court's award of interest from the date of the arbitrator's decision (*id.* at A21-A26). The FDIC has not sought review of the court of appeals' rulings in favor of petitioners.

1. The court of appeals concluded that the purchase agreement unambiguously required Air Florida to make a tender offer "reasonably calculated to obtain outstanding shares of Westgate" (Pet. App. A14). Petitioners do not ask this Court to review the court of appeals' interpretation of the language of the agreement. Instead, they maintain (Pet. 2-3) that under the circumstances of this case the court of appeals, rather than interpreting the agreement's language for itself, should have deferred to the district court's reading.

Petitioners do not challenge the court of appeals' general approach to contract interpretation. As the court explained, "[t]he meaning of a contractual term and the determination whether such a term is ambiguous are both questions of law subject to de novo review. If ambiguity exists and the district court makes factual findings as to the parties' intent, the court's findings will not be disturbed unless clearly erroneous" (Pet. App. A8 n.2 (citation omitted)). See, *e.g.*, *Pennsylvania Avenue Dev. Corp.* v. *One Parcel of Land in the District of Columbia*, 670 F. 2d 289, 292 (D.C. Cir. 1981); *In re Stevenson Associates, Inc.*, 777 F. 2d 415, 418 (8th Cir. 1985).[4] Here, the court of appeals found the contract unambiguous (Pet. App. A14) and therefore reviewed the district court's conclusions de novo (*id.* at A8 n.2).

Petitioners argue that notwithstanding the general rule, when a contract has been approved by the district judge overseeing a receivership, and the same district judge

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[4] The courts of appeals generally treat interpretation of unambiguous contract language as a question of law, and the weighing of parol evidence of the parties' intent (where resort to such evidence is required) as involving questions of fact. See, *e.g.*, *Southern Natural Gas Co.* v. *Pursue Energy*, 781 F.2d 1079, 1081 (5th Cir. 1986); *Eatmon* v. *Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1518 (11th Cir. 1985). Petitioners cite no authority for a contrary rule.

later has occasion to interpret the contract in a suit arising out of a claimed breach, his interpretation is entitled to special deference from the court of appeals. That contention, which was not made below and is not supported by authority, is plainly wrong. The meaning of a contract depends, under California law, which was the choice of the parties here (see Pet. App. A10), upon the intention of the parties (see *ibid.*), not the intention of the approving judge (as later remembered by him). Judicial approval of a contract does not turn the contract into an order of court or make the approving judge a contracting party whose intention bears on its meaning.

Contrary to petitioners' suggestion (see Pet. 12-16), the application of the usual rule of review in this case does not deprive all receivers' contracts of "certainty or finality" (*id.* at 12). Judge Nielsen did not decide the point at issue here in connection with his approval of the receiver's contract; indeed, he specifically declined Air Florida's request in the receivership proceeding that he rule on the meaning of the tender offer provision (see C.A. Record Excerpts 162-172, 206-208), and he plainly regarded the present point as open for decision on the merits in the present case. The court of appeals was not reviewing the order approving the sale: it was reviewing the district court's interpretation of the contract in the present suit for breach of contract, and the fact that it disagreed with the district court does not foreshadow judicial chaos.

2. Petitioners also argue (Pet. 25) that the court of appeals allowed the FDIC "to build an evidentiary record, lose the case, then urge admission of the evidence as reversible error." That is not in fact what happened.

The FDIC argued in the district court that the agreement was clear in its favor as a matter of law but that, if the court found it ambiguous, extrinsic evidence confirmed the FDIC's interpretation. The district court stated

that its interpretation of the contract was the same whether based purely on the language or on parol evidence (Pet. App. B7), disagreeing with the FDIC on either basis.

In the court of appeals, the FDIC reiterated only its arguments based on the text of the agreement, contending that the text required reversal. The FDIC did not suggest, nor did the court rule, that the district court's judgment should be reversed *because* parol evidence had been admitted. See FDIC C.A. Br. 30-36. The court of appeals simply agreed with the FDIC that the contract unambiguously required Air Florida to attempt to obtain the public's Westgate stock and that the extrinsic evidence did "nothing to contradict the plain meaning of the agreement or render it ambiguous" (Pet. App. A14). Contrary to petitioners' implicit contention, the admission of parol evidence does not bar a court from finding an agreement unambiguous on its face.[5]

3. Finally, we note that the case is in an interlocutory posture. The district court on remand must first decide whether Air Florida's breach caused "a failure of consideration sufficient to be deemed material and thus to warrant rescission" (Pet. App. A18). If the district court finds that rescission is not appropriate, the district court has been instructed to assess a restitutionary or damage award (*id.* at A20), but the court of appeals did not specify the measure of the award. Accordingly, even if the petitioner presented questions meriting review, it would be appropriate to defer any such review pending the further proceedings in the lower courts.

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[5] This is thus not a case like *Computer Systems Engineering, Inc.* v. *Qantel Corp.*, 740 F.2d 59, 64-65 (1st Cir. 1984) (citation omitted), cited in the petition (at 25), in which a party has attempted to " 'invite error' by requesting jury instructions based on a statement of law it would subsequently seek to make a basis for reversal on appeal."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60344